

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES CO. and
MARK MAZZETTI,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

22-cv-1539 (JSR)

ORDER

JED S. RAKOFF, U.S.D.J.:

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain records sought in two related FOIA requests filed by plaintiffs The New York Times Company ("The Times") and one of its reporters, Mark Mazzetti, with defendant the United States Department of Justice ("DOJ"). The FOIA requests seek records related to the use by DOJ, including by its component agency the Federal Bureau of Investigation ("FBI"), of any digital surveillance products developed by the Israeli technology company NSO Group, notably including the "spyware" product known as Pegasus that allows users to gain full control of targeted smartphones. See ECF 9 ¶¶ 9-18.

During the initial conference held on March 25, 2022, DOJ represented it was not yet in a position to know the volume of any responsive materials. The Court therefore directed the parties to convene a joint status conference in approximately one month, at which time the Court would set a final and binding schedule for processing

and production of responsive materials and litigation of any outstanding disputes.

Pursuant to that directive, on April 26, 2022, the Court held a telephonic status conference without transcription or recording at which counsel for the Times and DOJ were present. DOJ reported that the FBI had partially completed its search and had located approximately 460 pages of potentially responsive records, which the agency could begin processing, and it estimated that there would likely be no more than 1,000 pages of potentially responsive records in total. The parties reported that they had been unable to agree to a processing schedule.¹ DOJ proposed to produce 500 pages of material on or before August 31, 2022 and 500 pages per month thereafter, while the Times proposed a first production of 300 pages by May 30, 2022 and 500 pages per month thereafter.

After consideration of the arguments of counsel presented in the status conference, and in view of its experience managing litigation over a wide variety of FOIA requests, the Court hereby orders that DOJ

¹ The Court rejected DOJ's argument that where the parties cannot agree on a processing and production schedule, FOIA mandates that the Court accept written briefing and an agency declaration before determining whether expedited processing is required and, if so, what is the soonest "practicable" time by which records can be processed and produced. See 5 U.S.C. § 552(a)(6)(E)(iii). As DOJ conceded, no binding precedent requires any such procedure, and courts in this District routinely set processing, production, and litigation schedules on the record during status conferences. Moreover, the Court previously announced that it would set a final and binding schedule for processing, production, and litigation at the subsequent status conference. So, to the extent DOJ had arguments to make regarding practicability, the time to make them was at the status conference.

shall complete all processing and production to the Times of any records that are responsive to the two FOIA requests upon which the Times has sued by no later than August 31, 2022. This is a final and binding deadline that will not be adjourned. The Court will presumptively treat any failure to adhere to that schedule as an instance of civil contempt.

Should any disputes remain after that disclosure, the parties may brief motions for summary judgment on the following schedule:

- Motion, filed by DOJ on or before 9/14/2022
- Opposition to motion and cross-motion, filed by the Times on or before 9/28/2022
- Reply in support of motion and opposition to cross-motion, filed by DOJ on or before 10/12/2022
- Reply in support of cross-motion, filed by the Times on or before 10/19/2022

The Court will hold oral argument on any motions for summary judgment on November 2, 2022, at 4:00 p.m. in Courtroom 14B, 500 Pearl Street. Should DOJ seek to employ procedures for the filing of classified materials, it should convene a joint phone conference with the Court as soon as practicable and in no event after August 31, 2022.

SO ORDERED.

New York, NY
April 26, 2022



JED S. RAKOFF, U.S.D.J.